

FMLA: Managing Certifications and Intermittent Leave

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FMLA Basics: Coverage

❖ **Covered Employer**

- 50 or more employees for 20 or more calendar workweeks.
- All federal, state, and local public agencies (including “local educational agencies”) regardless of 50 employees requirement.

❖ **Eligible Employee**

- Employed for at least 12 months
- Worked at least 1250 hours in previous 12 months
- Employed at a worksite with 50 employees within 75-mile radius.
 - IDAPA 15.04.01.242.01 disregards this requirement for state employees.

FMLA Basics: Reasons for Leave

❖ Family Leave

- Serious health condition of child, parent or spouse.
- Birth, adoption, or placement of child in foster care.
- Any “qualifying exigency” arising from spouse, son, daughter, or parent being a service member on active duty, or notified of a call to active duty.
- To care for a covered service member with a serious illness or injury (includes spouse, child, parent, or next of kin).

❖ Medical Leave

- Serious health condition of employee

FMLA Basic Protections

- ❖ Up to 12 work-weeks of job protected leave (unpaid/paid) in a 12 month period.
 - 26 work-weeks of leave during a single 12 month period to care for a covered service member (military caregiver leave).
- ❖ Reinstatement to the same or an equivalent position.
- ❖ Maintenance of healthcare benefits on the same basis as normally provided during periods other than FMLA leave.

FMLA Basics: 12-month period

- ❖ An employer is permitted to choose one of the following methods for determining the 12-month period:
 - The calendar year
 - Any fixed 12-month leave year, such as a fiscal year.
 - The 12-month period measured forward from the date any employee's first FMLA leave begins.
 - A rolling 12-month period measured backward from the date the employee uses any FMLA leave.
- ❖ Military caregiver leave: starts on the first day leave begins and ends 12-months later.
 - Must track separately from traditional FMLA year.
 - Must designate first as military caregiver leave if it qualifies for both military and traditional FMLA.

FMLA Basics: What kind of leave

- ❖ Block Leave
 - A single period of leave taken once
- ❖ Intermittent Leave
 - Leave taken in separate blocks of time due to a single qualifying reason.
- ❖ Reduced Schedule Leave
 - Leave schedule that reduces an employee's usual number of working hours per workweek or workday.

Intermittent Leave/Reduced Schedule Leave

- ❖ When permitted, and for what purposes? (29 C.F.R. § 825.202)
- ❖ Medical Necessity
 - Employee's own serious health condition.
 - To care for a covered family member with a serious health condition.
 - To care for a covered service member with a serious injury or illness.
- ❖ Distinguished from leave after birth or placement of a child.

Calculating Intermittent Leave

- ❖ Only the amount of leave **actually taken** may be counted toward 12 weeks of leave entitlement. 29 C.F.R. § 825.205
- ❖ Actual workweek is the basis for the 12 weeks entitlement.
- ❖ Part-time/Variable schedules: 12 week entitlement is calculated using pro rata or proportional basis to their normal workweek. (30 hours/wk. = 360 hours).
 - If schedule varies from week to week, a weekly average of hours scheduled over the prior 12 months prior to the beginning of the leave period.
- ❖ Impact of overtime. Must be mandatory and regular to be counted. If included in employee's entitlement, must be counted against entitlement when overtime is missed.

Intermittent Leave Following a Continuous Period of Absence

- ❖ Propriety of intermittent leave after weeks off?
 - Leave time still available?
 - Does the current certification justify intermittent leave?
 - Usually the certification only addressed initial block of leave.
 - Child-care intermittent leave only at employer's discretion.

Special Leave Rules For “Instructional Employees” of a Local Educational Agency

Instructional Employee

An employee whose principal function is to teach students in a class, group or individual setting.

Includes coaches, special education assistants and driving instructors.

Does not include teacher assistants, aides, cafeteria workers, building service workers, or bus drivers.

Local Educational Agency

Includes public school boards (or other legal public authority) and the public and private elementary and secondary schools.

Does not include preschools, trade schools, colleges or universities.

Special Intermittent Leave Rules For Instructional Employees

20% Rule for Foreseeable Planned Medical Treatment:

If the instructional employee is planned to be on leave more than 20% of the working days during the period of intermittent medical leave, the school may require:

- Take a block of leave of a particular duration, not to exceed the duration of the planned intermittent leave; OR
- Transfer temporarily to another position – with equivalent pay and benefits, for which they are qualified and better accommodates the employee's intermittent leave.

Special Rules for Leave For Instructional Employees Near End of Term

Leave Requested Near End of The Academic Term:

- ❖ Leave **more than 5 weeks prior** to the end of academic term
School may require continuous leave until end of the academic term if:
 - Period of leave is at least 3 weeks; and
 - Return to work would occur during last 3 weeks of academic term.
- ❖ Leave **within 5 weeks of the end** of academic term
School may require continuous leave until end of academic term if:
 - Period of leave is longer than 2 weeks; and
 - Return to work would occur during last 2 weeks of academic term.
- ❖ Leave that begins **within 3 weeks of the end** of academic term, school may require leave until end of academic term provided the length of the leave is more than 5 working days.
 - Exception: Leave taken for employee's own serious health condition.

Medical Certifications

- ❖ Employer may require medical certification of employee's own serious health condition, or that of a family member.
- ❖ Employer must notify employee requirement and consequences within 5 days of employee request for FMLA.
- ❖ Employee must provide within 15 days of employer's request.

IF EMPLOYEE FAILS TO PROVIDE CERTIFICATION:

If leave was foreseeable: May deny or delay leave.

If leave not foreseeable: Employee must provide "as soon as reasonably possible" (at least 15 days, maybe more)

Medical Certifications: Content

- ❖ List of things that may be asked of the health care provider (29 C.F.R. § 825.306) Should include:
 - Date on which serious health condition commenced.
 - Probable duration of the condition, and
 - A statement that the employee is unable to perform the functions of the position because of the condition.
- ❖ Where providing care for a covered family member:
 - An estimate of the amount of time employee needs to care for them.
 - A statement that the serious health condition warrants the participation of a family member to provide care during a period of treatment or supervision.

Medical Certifications: Additional Requirements for Intermittent Leave

- ❖ Must explain the medical necessity for this kind of leave;
- ❖ The expected duration of intermittent or reduced schedule, and, if applicable:
 - The date on which the treatment is to be given; and
 - The duration of the treatment.

Medical Certifications: Completeness

- ❖ Medical certification considered incomplete if:
 - One or more of the entries not completed, or
 - Information provided is vague, ambiguous, or non-responsive.
- ❖ Employer must advise employee in writing what additional information is necessary to make certification complete.
- ❖ Must allow 7 calendar days to cure any deficiency, unless not practical (possibly more time).
- ❖ Failure to cure = denial of FMLA

Medical Certifications: Clarification

- ❖ **When**: You may contact the healthcare provider to clarify a certification, but only if you have first given the employee an opportunity to cure any deficiencies.
- ❖ **Who**: The only people that may contact healthcare provider are Human Resources Professional, Leave Administrator, or a Management Official.
 - Employee's direct supervisor may never contact the health care provider.
- ❖ **What** can you ask the health care provider:
 - Verify the information on the certification form was completed or authorized by the health care provider,
 - To clarify illegible handwriting, and
 - Clarification on the meaning of their response.
- ❖ Cannot ask for additional information beyond certification form.

Subsequent Re-certification

- ❖ Employer may request re-certification no more than every 30 days, **unless minimum duration on original certification is longer, or unless**:
 - Circumstances described by previous certification have changed significantly;
 - Employer received information that casts doubt upon the employee's stated reason for the absence;
 - The employee asks to extend the period of leave.
- ❖ In all instances, may request re-certification every 6 months for conditions that extend beyond 6 months.
- ❖ Employee has 15 calendar days to provide re-certification.

Fitness for Duty Certifications

- ❖ Employer may require fitness for duty certification as a condition to return to work if:
 - They are required for all similarly situated employees;
 - The certification is limited to the medical condition that necessitated the leave;
 - Employee was properly notified of requirement to provide one in your first notice letter granting FMLA leave;
 - Must comply with the ADA – it must be job related and consistent with business necessity.
- ❖ Certification may be a simple statement the employee can return without any restrictions, or a written assessment regarding their ability to perform all essential duties.

Tips for Managing Intermittent Leave

- ❖ Nothing in the FMLA prevents employers from ensuring that employee's who are on leave from work do not abuse their leave, or prevents employers from investigating suspected abuse.
- ❖ Employee's repeatedly taking intermittent leave can be disruptive to employer operations (and employee morale), yet employer's need to follow the law's requirements.
- ❖ Example's of potential abuse:
 - Second jobs during work hours
 - Monday/Friday pattern of absences
 - Refusal to work overtime or weekends

Managing Intermittent Leave: Tip 1

❖ Confirm Eligibility

- Confirm whether or not they are eligible to take it. (Employed 12 months + 1250 hours worked in prior 12 months)
- And, give them notice if they're not eligible, even if they haven't asked for FMLA leave but need to be absent.

❖ And, confirm the extent of their entitlement

- Particularly for part-time employees.
- 24 hrs./wk. x 12 weeks = 288 hours
- vs. 40 hrs./wk. x 12 weeks = 480 hours

Managing Intermittent Leave: Tip 2

❖ Restrict it (within the law).

- Define the smallest increment allowed for leave. When leave is taken, count all of it and track it.
- Choose not to allow intermittent leave for birth, adoption or placement of a child. Require it to be taken as a block of time.
- Require advance scheduling of planned medical leave/treatments.
 - Employees must attempt to schedule leave so as not to disrupt employer's operations. See 29 C.F.R. § 825.203
- Require accrued (paid) leave to be used concurrently with FMLA leave.
- Consider a temporary transfer for employee's requiring planned intermittent leave to another position that better accommodates the leave. (See next slide for requirements)

Managing Intermittent Leave: Tip 2 Cont.

- ❖ Temporary transfer to an alternative position is possible under FMLA, but with some stringent limitations. (See 29 C.F.R. § 825.204)
 - Only available when need for intermittent leave is foreseeable (i.e. treatment schedule). Not available when intermittent leave is episodic.
 - New position must provide equivalent pay and benefits and better accommodates the employee's intermittent or reduced schedule leave.
 - Cannot be instituted to discourage use of leave or to retaliate for the exercise of FMLA rights.
 - Part-time position is ok, as long as the reduced schedule is not counted against their leave entitlement.

Managing Intermittent Leave: Tip 3

- ❖ **Use Medical Certifications**
 - Insist the medical certification is "complete" and put the burden on the employee to obtain any missing information.
 - Ensure certification supports the leave requested and is not ambiguous or does not adequately explain the need for the leave.
 - Provide the healthcare provider a job description or list of essential job functions so they are in a better position to determine if the employee can or cannot perform essential duties.
 - If a complete medical certification is not provided, treat the absences as non-FMLA subject to the employer's attendance policy.
 - Consider requiring a new certification when and if permitted by the DOL regulations.
 - Significant changed circumstances; information casting doubt upon prior stated reason; employee seeking extension of leave)
 - Every 6 months.

Managing Intermittent Leave: Tip 4

❖ **Prohibit Moonlighting**

- An employee may not continue to work at a second job during FMLA leave if the employer has an established policy that prohibits outside employment. [DOL Opinion Letter No. 106 \(July 1999\)](#)
- Have a written policy which prohibits outside employment. If this is more than an employer is willing to prohibit, at least have a policy that prohibits outside employment while an employee is on paid or unpaid leave where benefits may be retained while on leave.

Managing Intermittent Leave: Tip 5

❖ **Use all the tools at your disposal.**

- Have call-in procedures. Require employees to call in whenever they are absent (and to do so by designated time).
 - Obtain a “status report” each time the employee calls in by asking for detailed information about the absence.
 - For example: Ask what the problem is, how long it will last, whether the employee will be able to work part of the day, why they cannot work, if they will be seeing or calling the doctor, and if not, why.
- Pattern of Monday/Friday absences: May justify requiring recertification provided there is no evidence that provides a medical reason for the timing of such absences.
 - FMLA does not prohibit employer from including a record of an employee’s absences along with certification form for the health care provider’s consideration in determining employee’s likely period of future absences. (See: [DOL Opinion Letter – May 25, 2004](#))

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Questions?

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Thank You!

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